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In the Supreme Court

of the United States

OCTOBER TERM

No. 1000

PACIFIC INLAND NAVIGATION COMPANY,
a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-67

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No._____

PACIFIC INLAND NAVIGATION COMPANY,
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DELBERT A. COURSE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on November 26, 1966.

OPINIONS OF THE COURTS BELOW

The opinion of the United States District Court for the District of Oregon is unreported. It appears at pages 61-63, Volume I, Transcript of Record. The

opinion of the Court of Appeals is not reported but it appears at page 105 of Volume I, Transcript of Record and is printed in Appendix B, infra, pp. 16-18.

JURISDICTION

This Petition for Writ of Certiorari is filed less than ninety days after entry of judgment by the Court of Appeals.

The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Title 33 U.S.C. Secs. 905 and 933; Longshoremen's and Harbor Workers' Compensation Act (Appendix A, infra, p. 15).

QUESTION PRESENTED

Does the case of *Reed* v. *SS YAKA*, 373 U.S. 410 (1963) authorize an *in personam* action by a ship repairman against his tugboat owner-employer, in face of the plain language of Title 33 U.S.C. Sec. 905, prohibiting such suits.

STATEMENT OF THE CASE

This action involves a libel *in personam* for damages for unseaworthiness of the tug "BANNOCK" and negligence of the tug owner instituted by a ship repairman-marine electrician, Delbert A. Course, re-

spondent, against his tugboat owner-employer, Pacific Inland Navigation Company, petitioner. The claim results from an injury sustained aboard the tug "BANNOCK" while lying in navigable waters of the United States at petitioner's tugboat repair yard at Vancouver, Washington, on December 19, 1963.

The tug "BANNOCK" was wholly owned and operated by petitioner. Respondent had been in petitioner's employ for more than one year prior to his injury (page 7 of Volume II, Transcript of Record) and worked only upon vessels belonging to petitioner (page 86, Volume II, Trancript of Record).

Respondent received from petitioner the statutory benefits of the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. Secs. 901, et seq.

The District Court allowed the respondent to maintain the action under the assumed authority of *Reed* v. *SS YAKA*, supra.

The Court of Appeals affirmed on the ground that *Reed* v. *SS YAKA*, supra, read Sec. 905 out of the Longshoremen's and Harbor Workers' Compensation Act as applied to the case at bar.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below destroys the immunity of an employer to an employee provided by Congress in Title 33 U.S.C. Sec. 905.

By enacting the Longshoremen's and Harbor Workers' Compensation Act, supra, Congress created

a comprehensive system for compensating longshoremen and harbor workers for injuries arising out of their employment. As a *quid pro quo* to support the imposition of liability without fault, Congress specifically made the liability of an employer to an employee "exclusive and in place of all other liabilities—at law or in admiralty."[1] Congress reserved to these workmen the right to seek damages from third persons causing injury, but in Sec. 933 (a) made it crystal clear that they could not seek such damages from their employers (Appendix A, infra, p. 15).

In *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956) this Court recognized that Sec. 905 limited an employer's liability to an employee, but held that Sec. 905 did not prevent the damages recovered by an employee from a third person from being visited upon the employer where the employer had, by a contractual agreement, agreed to assume the greater liabilities of the third party shipowner. However, this Court made it clear that the liability imposed upon the employer did not arise from any duty owing to its employee, because of the employment relationship. 350 U.S. at pp. 131, 132.

Three years after *Ryan*, a committee of Congress, while considering amendments to extend the employers immunity to the injured workmen's fellow-servants, reaffirmed the exclusiveness of the employer's liability in Senate Report 428, U. S. Congressional and Administrative News, 1959, Vol. 2, page 2134, saying:

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[1] Title 33 U.S.C. Sec. 905.

> "Sec. 5 (905) of the Longshoremen's and Harbor Workers' Compensation Act, makes the statutory liability of an employer the exclusive liability for injury to an employee *arising out of the employment.* This section also reserves to the employee the right to recover against third parties causing injury." (emphasis supplied)

In spite of this clear Congressional mandate and of this Court's construction of Sec. 905, the Court below held that *Reed* v. *SS YAKA*, supra, read Sec. 905 out of the Act to allow a ship repairman to maintain a direct action against his employer-tugboat owner.

That this Court's holding in *Reed* v. *YAKA*, supra, contemplated no such result, is clearly demonstrated by this Court's recent holding in *United States* v. *Demko*, — U.S. —, 17 L. Ed. 2d 258 (1966) limiting Demko to compensation provided in Title 18 U.S.C. Sec. 4126 to the exclusion of the Federal Tort Claims Act, saying:

> "In *Johansen* v. *United States*, supra, at 440-441, this Court stated 'where the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.' Later in *Patterson* v. *United States*, supra, at 496, this Court emphatically refused to abandon the Johansen ruling calling attention to the fact that Congress by specific statute could change the Johansen policy at any time."

As pointed out above in Senate Report 428, supra, Congress has not made legislative changes in Sec. 905.

On the contrary, Congress reaffirmed the immunity of the employer and by enacting Sec. 933 (i) extended it to all within the employee family.

2. The decision of the Court below decided a Federal question which has not been, but should be, decided by this Court.

Reed v. *SS YAKA*, supra, did not decide that an employer was liable to his employee-ship-repairman, because the employer owned the tugboat upon which the repairman was injured.

In *Reed* v. *SS YAKA*, supra, a longshoreman, Reed, was allowed to recover through a libel *in rem* against a vessel owned by a third party, Waterman Steamship Co., which had been bareboat chartered to Pan-Atlantic S.S. Corp., which was also Reed's employer. The charter contained a complete hold harmless agreement running from Pan-Atlantic to Waterman. Reed, injured by a defective pallet board supplied by Pan-Atlantic, filed a libel *in rem* against the SS YAKA. Waterman appeared as owner and claimant, and pursuant to the hold harmless agreement, impleaded Pan-Atlantic for indemnity. The District Court[2] held that Reed could recover on his libel *in rem* against the SS YAKA and that Waterman, pursuant to the indemnity agreement, was entitled to be made whole by Pan-Atlantic.

The Third Circuit[3] held that its prior decision in

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[2] *Reed* v. *S.S. YAKA*, 183 F. Supp. 69 (E.D. Pa. 1960).

[3] *Reed* v. *S.S. YAKA*, 302 F.2d 255 (3 C.A. 1962).

Smith v. *The MORMACDALE*, 198 F.2d 849, (3 C.A. 1952) prevented maintenance of the action.

This Court reversed the Third Circuit thus returning the case to its former posture in the District Court. This is the same tri-partite posture sanctioned by Title 33 U.S.C. Sec. 933 (a).

This Court in *Reed* v. *SS YAKA*, supra, while stating that Pan-Atlantic's liability to Reed arose out of its status as a bareboat charterer of a vessel, was concerned with the contractual agreement, whereby the charterer, Pan-Atlantic, had expressly agreed to indemnify the third party shipowner for any claims made against the vessel. Thus, Pan-Atlantic's liability to Reed arose solely from the hold-harmless agreement running to the shipowner, and not because Pan-Atlantic was the owner *pro hac vice*.

This is the same theory upon which liability was imposed by this Court upon the employers in *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, supra, and in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597 (1963).

Assuming that this Court is of the opinion that *Reed* v. *SS YAKA*, supra, is not based upon the contractual assumption of liability, it is respectfully submitted that the case at bar is still not settled by that case.

a. *Libel in rem*

This case proceeds not by way of a libel *in rem* but instead as a complaint at law wherein respondent

contended in the Pretrial Order, that he was entitled to recover from petitioner for the unseaworthiness of its vessel and the negligence of his fellow employees (Pages 53-58, Volume I, Transcript of Record).

Respondent made the same contention on appeal to the Court of Appeals. (Appendix B, infra, pp. 16-17).

Reed v. *SS YAKA*, supra, held only that an employer of a longshoreman, who is also a ship charterer, may be charged with responsibility for unseaworthiness of the ship, which obligation will support a libel *in rem* 373 U.S. at 416. Indeed, this holding was anticipated by Judge Learned Hand in the oft-cited *Grillea* case. *Grillea* v. *U. S. and National Shipping Authority*, 232 F.2d 919 (2 C.A. 1956). Judge Hand held initially[4] that there was no personal liability of the United States to an injured longshoreman when the United States had bareboated its vessel to Moore-McCormack Lines because the unseaworthiness found arose after the charter. On the petition for rehearing,[5] Judge Hand treated the libel as a libel *in rem* and allowed recovery from the vessel, holding that the contract by which the demisee operated the vessel made the demisee personally liable for the condition of the vessel and hence supported the libel *in rem*.[6]

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[4] *Grillea* v. *U. S. and National Shipping Authority*, 229 F.2d 687 (2 C.A. 1956).

[5] *Grillea* v. *U. S. and National Shipping Authority*, 232 F.2d 919 (2 C.A. 1956).

[6] "That does not indeed answer the question whether a maritime lien can be imposed upon a ship for a claim on which no jural person is liable 'in personam.' Moreover, although in the case at bar the demisee was liable under the

The vessel itself is the offending instrument whose condition determines liability so long as a jural person has agreed to be responsible for the vessel's condition and thus support the libel. The liability is, however, determined by the dangerous condition of the *res* and not by reference to the negligence of the employees of the jural person. It is for this reason that the action must proceed as an action *in rem* rather than as an action *in personam*. If the latter were allowed, a longshoreman would be permitted to recover from a shipowner for the negligence of his fellow longshoreman if the shipowner acted as a stevedore. In that instance, his fellow longshoreman would be employees of the shipowner and under principles of *respondeat superior* their negligence would be imputed to the shipowner. Indeed, this is what the respondent

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Longshoremen's and Harbor Workers' Act, Sec. 901 et seq., Title 33 U.S.C., the liability was only for compensation—a claim different from that in suit, both in kind and amount. So far as we have found, this is a question that has never come up in the books, although, as *res integra*, we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'. That would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed. Be that as it may, a demisee who is under only a limited liability to his employee may make himself liable to the demisor for full recovery in case the demisor is so liable to the employee. That will be true if the demisee has broken a contract with the demisor and the injuries to the employee measure the damages for the breach. In the case at bar, the demisee had made such a contract, for the charter (Clause 27) contained the following promise: 'the charterer shall indemnify the owner against any lien * * * arising out of the operation of the Vessels by the Charterer.' Therefore, even though one thought it unjust as between the two that the demisor should be liable for full damages when the demisee was not, this clause is an answer." 232 F.2d 923, 924.

attempted to do in the case at bar when he claimed that he was entitled to recover for negligence.

The incongruous result of which this Court complained in *Reed* v. *SS YAKA*[7] would thus be created if an action *in personam* is allowed. A longshoreman employed on a vessel operated by his employer could recover for the negligence of his fellow employees, while a longshoreman employed on a vessel operated by a third party could not recover for the negligence of his fellow employees unless such negligence created an unseaworthy condition. *Spinelli* v. *Isthmian S.S. Co.*, 326 F.2d 870, (2 C.A. 1964), Cert. denied 377 U.S. 935.

It is protection for unseaworthiness which is sought in *Reed* v. *SS YAKA*, supra, and such protection is fully secured through a libel *in rem*. Allowance of an action *in personam* opens the door to additional liability neither provided for nor consistent with *Reed* v. *SS YAKA*, supra.

b. *Respondent not a longshoreman*

If the case of *Reed* v. *SS YAKA*, supra, can be construed to permit a longshoreman to rely upon his employer-vesselowner's dual personality to sustain a cause of suit against his employer, petitioner submits

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[7] "We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service." 373 U.S. 415.

that the rationale employed by this Court in allowing a longshoreman to do so is not applicable to a tugboat repairman.

Longshoremen receive their job opportunities through the offices of a central hiring hall rather than from face-to-face meetings with their prospective employers. Longshoremen are dispatched to their jobs without regard to whom their employers will be or on what vessels they shall work. Sometimes their employer is an independent stevedoring contractor and at other times it is a shipowner.

Noting the transient nature of the longshoremen's employment, this Court expressed a desire to afford them equal remedies whether they were employed aboard a vessel by an independent stevedoring company or by a shipowner.

Respondent, on the other hand, was steadily employed by petitioner. He was employed in petitioner's tugboat repair yard for more than one year prior to his injury (page 7, Volume II, Transcript of Record). Moreover, when he worked on vessels, he worked only upon tugboats solely owned and operated by petitioner (page 86, Volume II, Transcript of Record).

The rationale of this Court was to make a longshoreman's remedy for damages available whether he was employed by an independent stevedoring contractor or directly by a shipowner. To apply this rationale to the case at bar would result in giving respondent a remedy for damages which, because of the lack of a third party, he never enjoyed.

3. The Decision of the Court below conflicts with prior holdings of this Court.

This Court has consistently construed Sec. 905 as preventing an employee from maintaining a cause of action for damages against his employer. It has been so held whether the cause of action is granted to the employee by an Act of Congress or one traditionally recognized by the *admiralty common-law*. *Nogueira* v. *N. Y. N. H. and H. R. Co.*, 281 U.S. 128 (1930) and *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U.S. 334 (1953), *Federal Employees' Liability Act; Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946), *Jones Act; Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, supra, *admiralty common-law*.

In 1958 by refusing to accept certiorari in *Bennett* v. *The MORMACTEAL*, 358 U.S. 817, 254 F.2d 138 (2 C.A. 1958) this Court, at least impliedly, held that Sec. 905 prevented an employee from recovering through a libel *in rem* against a vessel which was owned by his employer, thereby preventing an employee from doing indirectly what he could not do directly.

4. Importance of the Question.

The United States Government, in operation of its rapidly growing marine service, has protected its employees under a Congressional Act known as the Federal Employees' Compensation Act, 5 U.S.C. Sec. 757 (b). This Act differs from the Longshoremen's and Harbor Workers' Compensation Act, supra, in

that the latter excludes, by explicit terms, members of the crew of any vessel, Sec. 903, 3a (1), while the former applies to all Federal civilian employees, crew members and shore-based workers alike, who are strictly limited to compensation benefits to the exclusion of the Public Vessels Act and Suits in Admiralty Act. *Amell* v. *United States*, 384 U.S. 158 (1966); *Johansen* v. *United States*, 343 U.S. 427 (1952); and *Patterson* v. *United States*, 359 U.S. 495 (1959).

The exclusive remedy provisions of each act, however, are almost identical, and in *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 602 (1963) this Court held that they are to be construed the same.

If *Reed* v. *SS YAKA*, supra, is to be construed as holding that employee injuries caused by an unseaworthy condition must be deemed excepted from the exclusive remedy provision in Sec. 905, then as *Weyerhaeuser S.S. Co.* v. *United States*, *supra*, teaches, employee injuries must be similarly excepted from the exclusive remedy provisions of the Federal Employees' Compensation Act. Thus the holding of the Court below would render the Government amenable to direct actions by its maritime employees.

Others vitally affected by the decision of the Court below are petitioner's thirteen fellow members of the Columbia River Towboat Association, all of whom have traditionally repaired their own tugboats. Each operator employs tugboat repairmen who, like Delbert Course, are permanent employees.

While petitioner can only speak for itself and

other local tugboat operators, one can imagine that tugboat operators on both coasts, the Great Lakes, and all inland waterways are similarly affected.

CONCLUSION

For the foregoing reasons, petitioner prays that this petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

33 U.S.C. Section 905:

"EXCLUSIVENESS OF LIABILITY. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

33 U.S.C. Section 933 (a)

"If on account of a disability or death for which compensation is payable under this Chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC INLAND NAVIGATION COMPANY, a corporation,	*Appellant,*	
vs.		No. 21,080
DELBERT A. COURSE,	*Appellee.*	

[October 26, 1966]

On Appeal from the United States District Court for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and MATHES, District Judge

MERRILL, Circuit Judge:

This appeal presents the question whether a shipowner which operates its own repair yard can be held liable to its employee harbor worker for shipboard injury resulting from unseaworthiness of the vessel.[1]

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[1] This was a libel in personam, grounded on the admiralty jurisdiction of the District Court. 28 U.S.C. §1333(1) (1964).

Libelant first brought an action at law, alleging both unseaworthiness and negligence, grounded upon diversity jurisdiction. Upon Pacific's motion the negligence (Jones Act) claim was dismissed; later the unseaworthiness claim was transferred to admiralty by stipulation. Libelant has cross-appealed the dismissal of his negligence count, on the ground that even if a Jones Act claim will not lie, he can maintain a negligence action on the admiralty side under traditional maritime law, see *Pope & Talbot* v. *Hawn*, 346 U.S. 406, 413

The worker was covered by the Longshoremen's and Harbor Workers' Compensation Act,[2] and appellant contends that §905 of that Act precludes recovery.[3] The District Court held otherwise, relying on *Reed* v. *The Yaka*, 373 U.S. 410 (1962).

Appellant seeks to distinguish that case, asserting that there the employer, holding a bareboat charter from the shipowner, was obligated under the charter agreement to make the owner whole for damages resulting from an unseaworthy condition caused by the charterer. Appellant thus likens that case to *Ryan Stevedoring Company* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan* the imposition on the employer of the economic burden of its employee's recovery for unseaworthiness was allowed notwithstanding the provisions of §905. This result, however, was justified upon the ground that by its warranty to the shipowner the employer took upon itself not only its own limited obligations to its employee under the Act, but the obligations of the shipowner as well.

In this case, appellant asserts, we do not have the

(1953). Apparently the District Court did not rule on this contention. However, in view of our affirmance of libelant's unseaworthiness claim, we decline to rule either on the District Court's dismissal of the Jones Act claim, or on libelant's argument for a negligence claim in admiralty.

[2] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§901-950 (1964).

[3] 33 U.S.C. §905:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * * otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

three-party situation which existed in *Ryan* and in *The Yaka*, where the employer's unseaworthiness responsibility was based upon a duty to indemnify the owner. Here it is asserted if there is such responsibility it runs directly to the employee—a result which §905 expressly forbids.

Appellant misreads *The Yaka*. Its construction of the holding is in accord with the views of the District Court in *The Yaka* but is fairly contrary to the reasoning of the Supreme Court. The Supreme Court did not hold the shipowner liable for unseaworthiness. It expressly stated: "We do not reach that question here" (373 U.S. at 411, footnote 1). It held the charterer, as owner *pro hac vice*, to a warranty of seaworthiness running to its employee. The error on which the Court of Appeals was reversed was "in holding Pan-Atlantic [the employer and charterer] could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." (373 U.S. at 412). "The only question," the Court stated (at page 412) "is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of its warranty of seaworthiness." It rejected the contention (at page 414) "that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner, *pro hac vice*, of the ship but was also petitioner's employer."

Section 905 was, in clearest terms, held not to bar recovery by an employee for a breach of his employer's warranty of seaworthiness.

The District Court did not err in so holding.

Also assigned as error are holdings of the District Court rejecting appellant's contentions that the vessel on which injury was sustained was at the time a "dead ship"; that appellee was not at the time of injury engaged in seamen's work; that *The Yaka* is distinguishable upon the ground that it dealt with a longshoreman, while appellee was a marine electrician. In none of these do we find merit. The first contention we view essentially as one of fact upon which the court's finding was not clearly erroneous. On the last two contentions we regard *Pope & Talbot* v. *Hawn*, 346 U.S. 406 (1953) as controlling.

Judgment affirmed.

MATHES, Senior District Judge, concurring specially:

I concur in the result; but do so only because *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads § 5 out of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905], as applied to the case at bar.

SUPREME COURT, U. S.

In the Supreme Court

of the United States

OCTOBER, 1966 TERM

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PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

MOTION OF COLUMBIA RIVER TOWBOAT ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR GRANTING A WRIT OF CERTIORARI

(With proposed brief appended thereto)

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-67

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MOTION OF COLUMBIA RIVER TOWBOAT ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE FOR GRANTING A WRIT OF CERTIORARI

Comes now Columbia River Towboat Association and moves this Court for an order granting leave to file a brief amicus curiae on question of whether the petition for certiorari should be granted. Columbia River Towboat Association appeared as amicus curiae with consent of both parties in the Court below (368 F.2d 540). Now, only respondent refuses to consent to the appearance. The proposed brief is appended to this motion.

It is the position of Columbia River Towboat Association that this Court should grant certiorari and review the decision of the Court of Appeals for the Ninth Circuit which misconstrued this Court's holding in *Reed* v. *The Yaka*, 373 U.S. 410 (1963) and in so doing sanctioned a direct *in personam* action by a harbor worker against his employer for injuries received as a result of the unseaworthiness of his employer's tugboat. Section 5 of the Longshoremen's and Harbor Workers' Compensation Act clearly bars such an action.[1]

Your Petitioner's Interest

For many years the fourteen members of the Columbia River Towboat Association[2] have been engaged in towing and transporting cargoes on the Columbia and Willamette Rivers. Each operator, whether large or small, employ shop repairmen, welders and electricians precisely as did Pacific Inland

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[1] 33 U.S.C. No. 905: "The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, . . . otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

[2] Atlas Tug Service, Longview, Washington; Brusco Towboat Co., Cathlamet, Washington; Columbia Pacific Towing Corporation, Stevenson, Washington; Diesel Towing Co., Portland, Oregon; Knappton Towboat Co., Portland, Ore.; The Mirene Co., Portland, Ore.; Pacific Inland Navigation Co., Vancouver, Wn.; Ramona Towboat Co., Inc., Portland, Ore.; Shaver Transportation Co., Portland, Ore.; Shepard Towing Co., St. Helens, Ore.; Smith Tug & Barge Co., Rainier, Ore.; Tidewater Barge Lines, Inc., Portland, Ore.; Western Transportation Co., Portland, Ore.; Willamette Tug & Barge Co., Portland, Oregon.

Navigation Co. employ Delbert Course. These employees are employed regularly on a year around basis. They work primarily ashore but as occasion requires they board their employer's tugs and barges to repair, maintain or overhaul them. None are members of a crew and none do longshoremen's work or are employed through a hiring hall for specific jobs as are longshoremen. These tugboat operators, as employers, have long carried insurance as required by the Longshoremen's Act (as well as State compensation insurance as required for on-shore accidents) in order to fully afford these employees full protection even though they, at best, only work spasmodically upon navigable waters. The only consideration for giving these employees expensive compensation for injuries on a non-fault basis has been the assurance of Congress in Section 5 of the Act that these employees could not also sue their employer in law or in admiralty.

While petitioner can only speak for its own members, one can well imagine that tugboat operators on the Pacific and Atlantic Coasts as well as the Great Lakes and the great Western Rivers (Mississippi and Ohio Rivers) find themselves in the same plight as members of the Columbia River Towboat Association.

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In the Supreme Court
of the United States

OCTOBER, 1966 TERM

No. 1,000

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

BRIEF OF AMICUS CURIAE, COLUMBIA RIVER TOWBOAT ASSOCIATION FOR GRANTING A WRIT OF CERTIORARI

REASONS FOR GRANTING A WRIT

"Give us the grain, and throw away the straw."[3]

This Court's opinion in *Reed* v. *The Yaka*, 373 U.S. 410 (1963) is equivocal in respect to its language and its actual holding. That case came to this Court as

[3] Justice Story: Life and Letters, II, 89-90.

an *in rem* action by longshoreman Reed against the *YAKA* as claimed by her owner, Waterman Steamship Co. In turn Waterman impleaded Pan-Atlantic as a third party respondent *in personam* claiming that Pan-Atlantic as the bareboat charterer of the YAKA had breached its agreement to indemnify and save Waterman harmless from a claim such as was being asserted by longshoreman Reed. At no time did Reed assert a direct claim of any kind against his employer, Pan-Atlantic. The case was the typical "maritime triangle" as sanctioned by this Court in *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Co.*, 350 U.S. 124 (1956).

As we read *The Yaka* this Court was not called upon and did not hold that an *in personam* action could be brought by an injured longshoreman against his employer who was also a vessel owner. The Court of Appeals of Louisiana for the Fourth Circuit twice read *The Yaka* just as we do. *Robinson* v. *Lykes Bros. SS. Co.*, 170 So. 2d 243 (1965); *Helen Jackson* v. *Lykes Bros. S.S. Co.*, 185 So. 2d 342 (1966).

Considering that Article III of the Constitution limits this Court's jurisdiction to the deciding of justiciable controversies,[4] the only holding which this Court could have constitutionally made within the issues as framed and argued[5] is found in the last sentence of this Court's opinion reading:

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[4] Muskrat v. United States, 219 U.S. 346, 357 (1910).

[5] 373 U.S. Dissent in The Yaka by Mr. Justice Harlan joined in by Mr. Justice Stewart: ". . . Under a statute which was specifically written to include shipowners who employed their own dockworkers, and which excluded liability at law

> "We conclude that petitioner was not barred by Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the *Yaka's* unseaworthiness in order to support his libel *in rem* against the vessel."

The above holding does not judicially repeal Section 5 of the Longshoremen's Act nor does it sanction the direct action in admiralty by employee against employer as maintained in the Courts below.

Yet, the Court of Appeals by quoting language from *The Yaka* decision finds that this Court in the clearest of terms held that Section 5 of the Act (33 U.S.C. § 905) did not bar recovery by an employee for a breach of his employer's warranty of seaworthiness in a direct *in personam* action in admiralty against his employer.

So much has been left unsaid in this Court's *Yaka* opinion and so much consternation, hardship and injustice has accumulated in the shipping world as a result that a writ should be granted to clear the air so that both Congress and the shipping industry can know explicitly where they stand in respect to the compensation scheme that has long existed under the Longshoremen's Act.

Did this Court intend to repeal or nullify Section 5 of the Act? In spite of its constitutional inability

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or *in admiralty*, there is no room for concluding that an employer shipowner can be held liable to his own longshoreman employee for unseaworthiness. Indeed, the point was so clear that petitioner has had what I would have thought was the good sense not even to argue to the contrary. (He has instead based his argument wholly on the theory that the ship itself may be liable even in the absence of any underlying personal liability on the part of anyone)."

to have done so, Mr. Justice Harlan joined in by Mr. Justice Stewart in the dissenting opinion thinks so. Even in the Court of Appeals below, Senior District Judge Mathes thinks so. He concurred specially by stating:

> "I concur in the result; but do so only because *Reed* v. *SS YAKA*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads #5 out of the Longshoremen's and Harbor Workers Compensation Act (33 U.S.C. § 905), as applied to the case at bar."

Likewise, the Court of Appeals for the Fourth Circuit thinks so, *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (1966).

All this has come about in spite of this Court's earlier interpretations and applications of Section 5 of the Act as in *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946) and *Pennsylvania Railroad* v. *O'Rourke*, 344 U.S. 334 (1953) and lower court holdings in *Smith* v. *Mormacdale*, 198 F.2d 849 (3 Cir., 1952) and *Samuels* v. *Munson SS Co.*, 63 F.2d 861 (5 Cir., 1953).

More important, the Court of Appeals reading of *The Yaka* cannot on principal square with this Court's most recent holding in *United States* v. *Demko*, — U.S. —, 17 L. Ed. 2d 258 (Dec. 5, 1966).

This Court has long demonstrated a passionate desire to protect longshoremen. Perhaps a more appealing reason for granting a writ in this case is found in the 1959 amendment which Congress made

to Section 33a (33 U.S.C. § 933) of the Longshoremen's Act where, among other things, it added a new sub-section "(i)."[6] This new sub-section had as its unmistakable purpose the immunization of fellow employees of an injured harbor worker from direct actions at law or in admiralty identically with the same immunity given the employer under Section 5 of the Act.[7] This 1959 amendment was apparently overlooked by the Court when it decided *The Yaka* as the Court observed a lack of Congressional reaction to its recent decisions in this field of law.[8] If any consistency at all is to be accorded the Longshoremen's Act, both Section 5 and sub-section "(i)" of Section 33 of the Act must stand or fall together. Unless a writ is granted and the case below reversed we will have the anomalous situation of Congress in 1959 placing fellow employees of the "employee family" under the umbrella of immunity only to have this Court four years later shoving the employer, who is the head of

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[6] 33 U.S.C. § 933 as amended August 18, 1959, Pu. L. 86-171, 73 Stat. 391, which added: "(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ. *Provided*, that this provision shall not affect the liability of a person other than an officer or employee of the employer."

[7] *Bynum* v. *The Mormacteal*, 188 F. Supp. 763 (E. D. Pa., 1960); *Garland* v. *Alaska Steamship Co.*, 217 F. Supp. 757 (D. Ct., Alaska, 1963); *Report of Secretary of Labor to the Senate on H. R.* 451, U. S. Code, Congressional and Administrative News, 1959 at page 2134.

[8] From Court's opinion in *Reed* v. *The Yaka* (1963) 373 U.S. 410 at 414, ". . . We must view it in the light of our prior cases in this area, like Sieracki, Ryan, and others, the holdings of which have been left unchanged by Congress...."

the "employee family" out into the rain. Even for the sake of the "adopted wards" of admiralty a writ should be granted.

By this Court permitting the Court of Appeals to infer from *The Yaka* the reading of Section 5 out of the Longshoremen's Act is to create and compound the very harsh and incongruous effects upon the shipping community which this Court sought to avoid. Here are some of them:

1. The once equitable idea of an employer compensating his employees for on-job injuries irrespective of fault on a compensation basis in consideration of being protected against direct court actions at law or in admiralty by such employees has gone out the window.

2. Right now employers who carry what they had believed gave them full protection now find that they are exposed to unlimited liability because of the hiatus created by the Court below. This is because the standard insurance policy required by the Longshoremen's Act covers harbor workers only to the limit of compensation payments. In the case below, the harbor worker was already paid his compensation benefits before he sued and secured the $12,566.08 judgment against his employer. The standard public liability policy of the employer (stevedore or tugboat operator) usually covers all liabilities except for actions brought by "employees who are not members of a crew." We are aware of at least one case where both of the afore-mentioned insurance underwriters are

seeking declaratory relief; each claiming the liability belongs to the other.

3. The employer of the harbor worker who now finds the Longshoremen's Act nothing but an expensive snare and delusion cannot give up his insurance and get out of the trap. If he fails to keep up such insurance he can be fined and thrown into jail (33 U.S.C. 938).

4. The shipping industry must have reasonable certainty of its exposure to liability for injury to its workers. The case below and others which have stemmed from this Court's decision in *The Yaka* have created nothing but confusion and consternation in this industry which is so vital to the prosperity and well being of our nation.

So little is required and so much is to be gained by granting a writ and restore rhyme and reason to this presently confusing situation that your petitioners pray that this Court in its wisdom grant the writ as prayed for by Pacific Inland Navigation Company.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Petitioner consents to motion of Columbia Towboat Association to appear amicus curiae and acknowledges receipt of copies of motion and proposed brief.

Dated: at Portland, Oregon this ..... day of February, 1967.

Of Counsel for Petitioner

Respondent does not consent to motion of Columbia Towboat Association to appear amicus curiae but does acknowledge receipt of copies of motion and proposed brief.

Of Counsel for Respondent

SUPREME COURT, U. S.

FEB 17 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1966

No. 1000

PACIFIC INLAND NAVIGATION COMPANY,
a corporation,
Petitioners,

v.

DELBERT A. COURSE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DAILY JOURNAL OF COMMERCE

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1000

PACIFIC INLAND NAVIGATION COMPANY, a corporation,
Petitioner,

vs.

DELBERT A. COURSE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 26, 1966, be denied.

QUESTION PRESENTED

Can a ship repairman maintain an action against a ship owner, who is also his employer, for injuries resulting from an unseaworthy vessel?

STATEMENT OF THE CASE

A libel *in personam* was filed against petitioner for injuries due to the unseaworthiness of the tug *Bannock*. Negligence was also alleged initially, but was stricken by the District Court and not reinstated by the Court of Appeals (See Appendix A, Footnote 1) so this question is not involved in this petition.

Respondent was employed as a ship repairman—marine electrician by petitioner and in the course of his employment worked on various of petitioner's vessels, including the tug *Bannock*. Petitioner appealed from a decree entered in favor of respondent in the District Court finding the vessel unseaworthy and the Court of Appeals affirmed October 26, 1966 (Appendix A). The right to, and the amount of benefits respondent received pursuant to the Longshoremen's and Harbor Workers' Compensation Act, Title 33 U.S.C. §§ 901, *et seq*, were not in issue at the trial.

ARGUMENT FOR DENYING THE WRIT

1. There is no basic conflict in the interpretation of *Reed v. S. S. Yaka*, 373 U.S. 410 (1963).

A writ of certiorari to this very same Ninth Circuit Court of Appeals was denied January 9, 1967, in the case of *Grace Line, a corporation, and S. S. Santa Juana, petitioners*, v. *Michael J. Kanton, respondent*, involving

the central issue herein raised by this petitioner. In that case also, respondent was employed by petitioner as a longshoreman and was injured through the unseaworthiness of the vessel owned by petitioner. A judgment entered in favor of the injured party in the District Court, based on a libel *in rem*, was appealed to the United States Court of Appeals for the Ninth Circuit, affirmed *per curiam*, and the Petition for Writ of Certiorari subsequently denied by this court.

The courts have had no difficulty in applying the doctrine of *Reed v. S. S. Yaka, supra.* The attempt by Judge Hoffman, in the Eastern District of Virginia, Norfolk Division, to restrict the meaning and interpretation of this decision was quickly reversed in *Biggs v. Norfolk Dredging Company*, 360 F.2d 360 (4 Cir. 1966). The District Court attempted to confine *Reed* v. *S. S. Yaka, supra*, to longshoremen (*Biggs v. Norfolk Dredging Co.*, 237 F. Supp 590, at p 598). Such limitation was immediately struck down by the Court of Appeals, at page 363,

> The determinative factors in Reed v. The S.S. Yaka, supra, 373 U.S. 410, 83 S.Ct. 1349 are present in each case here. The Supreme Court's ruling was this: if an employer is the permanent or pro hac vice owner of the ship on which his employee is injured while working as a longshoreman, then the employee may sue his employer under the general maritime law for damages, notwithstanding that previously the employee has received compensation.

and, at page 364,

> Like reasoning applies to the instant cases. Each plaintiff now pleads himself a seaman, or alternatively as one doing a seaman's job, and thereby entitled to sue for unseaworthiness. See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99, 66, S.Ct. 872 (1946). It is now elementary that all who do traditional seaman's work are owed, and may sue on, the warranty of seaworthiness. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); Ross v. S.S. Zeeland, 240 F.2d 820 (4 Cir. 1957);
>
> Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599, 84 A.L.R.2d 613 (2 Cir. 1960), cert. den., 363 U.S. 844, 80 S.Ct. 1614, 4 L.Ed.2d 1728. The present plaintiffs may also be armed in like fashion.

and, at page 365,

> * * * that *Yaka* preemptorily dictates, to repeat, that a seaman-employee, actual or *Sieracki*, injured aboard his employer's vessel is to be put in the same position as one injured aboard a ship owned by a third party, and in the latter situation, the employee could recover compensation from his employer and still sue the third party for negligence or unseaworthiness.

Thus, the Court of Appeals for the Fourth Circuit and the Court of Appeals for the Ninth Circuit are in agreement as to the interpretation and application of *Reed v. S.S. Yaka, supra.* The district courts have had no difficulty. *Hertel v. American Export Lines*, 225 F.Supp. 703

(S.D.N.Y. 1964, (an *in personam* action by a longshoreman against the owner *pro hac vice*). See, also, *Peros v. Grace Line, Inc.*, 1966 Am.Mar.Cas. 1316 (S.D.N.Y. 1966); *Carroll* v. *S.S. Santa Rose*, 1966 Am.Mar.Cas. 2051 (S.D.N.Y. 1966); *Santiago v. Hermands*, 255 F.Supp. 932 (Puerto Rico D.C. 1966), all approving actions against the employer-ship owner.

2. *Reed* v. *S.S. Yaka*, 373 U.S. 410 (1963) permits this action against the vessel owner-employer.

Petitioner is asking for the strict and literal interpretation of the Longshoremen's and Harbor Workers' Compensation Act[1] which was rejected in *Reed v. S.S. Yaka, supra*, in the following language, at page 414,

> Pan-Atlantic relies simply upon the literal wording of the statute, and it must be admitted that the statute, on its face, lends support to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area like *Sieracki*, *Ryan*, and others, the holdings of which have been left unchanged by Congress.

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1. 33 U.S.C. §905 Exclusiveness of Liability. Sec. 905. The liability of an employer prescribed in Sec. 904 shall be exclusive and in place of all other liability of such employer to employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Chapter, or to maintain an action at law, or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

For the petitioner who possesses two hats, one denoting an employer, the other representing ownership and operation of a ship, this court spoke with unmistakable clarity, at page 414,

> In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen, but was also a bareboat charterer and operator of a ship, and, as such, was charged with the traditional, absolute, and non-delegable obligation of seaworthiness which it should not be permitted to avoid.

Reed v. S.S. Yaka, *supra*, forms the logical and symmetrical union between two growing lines of decisions. On the one hand, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, the warranty of seaworthiness was extended to an injured party not a member of the crew. In the face of arguments that seaworthiness arose out of the contractual relationship between the ship owner and the seaman, and that the Longshoremen's and Harbor Workers' Compensation Act was a bar to this action against the ship owner, the Supreme Court held that a stevedore, employed by a stevedoring company, could recover against the vessel owner for the unseaworthiness of the vessel. Following this decision, some courts, particularly in the Second Circuit, attempted, by one means or another, to limit this exten-

sion to stevedores and not include other shoreside personnel who were doing ship's service. See, for example, *Martini v. United States*, 192 F.2d 649 (1951 C.A.2N.Y.) This narrow interpretation was given its proper interment in the case of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, involving a carpenter who came aboard the ship to do minor repairs and was injured when he fell through an open hatch. This court said, at page 413,

> *Sieracki's* legal protection was not based on the name "stevedore," but on the type of work he did and his relationship to the ship and to the historic doctrine of unseaworthiness. * * * His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship, or of seamen who had been or were about to go on a voyage. All were subjected to the same danger, all were entitled to like treatment under law.

Concurrently with this broad concept of extending the protection of seaworthiness to all shoreside workers, injured while doing work traditionally performed by seamen, there developed a concept of indemnity by the employer to the ship owner, if the cause of the accident was due to the action, or inaction, of the employer. *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, involved an injury due to unsafe storage of cargo, wherein the original plaintiff obtained judgment against the ship owner, even though he had received

benefits under the Longshoremen's Act. It was held that the stevedoring company would be responsible to indemnify the ship owner for such loss, even though the result would be that the employer would then be buying compensation insurance, and, in addition thereto, be paying additional sums to ship owners. In *Italia Soc. v. Oregon Stevedore Co.*, 376 U.S. 315 (1963), the duty of indemnification was found to exist, even though there was no negligence on the part of the stevedore-contractor. The intent of *Sieracki* was to indemnify those injured due to unseaworthiness while engaged in the ship's service. The intent of *Ryan* is to place the burden, ultimately, on the company whose default caused the injury. When the ship owner and employer are the same person, performing two separate functions, this court spoke with clarity in *Reed v. S.S. Yaka, supra,* at page 414,

> Yet the Court of Appeals held, and Pan-Atlantic would have us hold, that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner *pro hac vice* of the ship, but was also petitioner's employer. In making this argument, Pan-Atlantic has not pointed, and could not point, to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under *Ryan*, the burden ultimately falls on the company whose default caused the injury.

3. *Reed v. S.S. Yaka, supra,* is indistinguishable.

Petitioner attempts to distinguish *Reed v. S.S. Yaka, supra,* on the ground that it was a third party case. Such was not the way this court approached the problem. The employer was the bareboat charterer and was treated by this court as the owner (p 412). In addition, this court stated,

> We have no doubt, and indeed Pan-Atlantic admits, that barring express statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel.

The statutory exemption referred to was the claimed protection of the Longshoremen's Act. Before coming to its decision, the court stated that,

> 'The *only* question is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's breach of its warranty of unseaworthiness.

It is hard to be more explicit. The contention that the Longshoremen's Act was a bar to a suit against his own employer was rejected.

Petitioner next contends, without citation of any authorities, that *Reed v. S.S. Yaka, supra,* could not include an action *in personam,* as opposed to an action *in*

rem. The court specifically found personal liability on the owner-employer, which would then support a libel *in rem* against the vessel, at page 412,

> We have no doubt, and indeed Pan-Atlantic admits, that, barring express statutory exemption, the bareboat charterer is personally liable for the unseaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel.

In other words, without actually deciding that personal liability was necessary to support a libel *in rem*, the court held that in *this case* there was personal liability because the Longshoremen's Act did not bar such personal liability. Personal liability, by definition, permits an *in personam* action, and the right to bring a libel *in rem* need not even be a problem in this case. The attempted distinction was cleanly snipped in *Hertel v. American Lines, Inc., supra*, at page 704,

> The defendant urges that the *Yaka* is to be distinguished because it was an *in rem* action, whereas the instant one is brought on the civil side *in personam*. However, the hard core of the court's decision, based as it is upon personal liability of the bareboat charterer, renders the claimed distinction invalid.

Although not a longshoreman, respondent was in the ship's service in performing a traditionally crew

member's work. To attempt to limit the scope of seaworthy protection to longshoremen would require a reversal of *Pope & Talbot, Inc. v. Hawn, supra,* (involving a carpenter), and of *The Tungas v. Skovgaard,* 358 U.S. 588, (involving a maintenance foreman).

4. The importance of the question is nil.

Petitioner attempts to suggest that *Reed v. S.S. Yaka, supra,* would allow maritime employees of the government to sue the government directly. Actions against the government are possible only where immunity has been waived, and the federal compensation system has previously been held a bar to such actions. *Johansen v. United States,* 343 U.S. 427 (1952).

There is no conflict within the Court of Appeals. Instead, there is uniform agreement as to interpretation of *Reed v. S.S. Yaka, supra.* The holding in this court in *Reed* was pronounced after careful consideration of the economic factors involved. As intended by the decision, the financial burden arising from the unseaworthiness of the vessel now ultimately rests on the party responsible for the condition. This is *not* (1) a matter where a state court has decided a federal question of substance not heretofore decided by this court; (2) a decision of a Court of Appeals in conflict with a decision of another Court of Appeals; (3) a decision concerning a state or territorial question in conflict with state or

territorial law ;(4) a decision on an important question of federal law not heretofore settled by this court; (5) a decision on a federal question in conflict with applicable decisions of this court, or (6) a departure from accepted or usual course of judicial proceedings. (See Rule 19, Supreme Court Rules). Interpretation has been easy and uniform. Certiorari has been previously denied on this same issue from the same circuit. No further clarification of the decision is necessary.

CONCLUSION

For the foregoing reasons, petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PACIFIC INLAND NAVIGATION COMPANY, a corporation,
Appellant,
vs.
DELBERT A. COURSE,
Appellee.
No. 21,080

[October 26, 1966]

On Appeal from the United States District Court for the District of Oregon

Before: MERRILL and KOELSCH, Circuit Judges, and MATHES, District Judge

MERRILL, Circuit Judge:

This appeal presents the question whether a shipowner which operates its own repair yard can be held liable to its employee harbor worker for shipboard injury resulting from unseaworthiness of the vessel.[1] The worker was covered by the Longshoremen's and Harbor Worker's Compensation Act,[2] and appellant contends that §905 of that Act precludes recovery.[3] The

1. This was a libel in personam, grounded on the admiralty jurisdiction of the District Court. 28 U.S.C. §1333(1) (1964).

Libelant first brought an action at law, alleging both unseaworthiness and negligence, grounded upon diversity jurisdiction. Upon Pacific's motion the negligence (Jones Act) claim was dismissed; later the unseaworthiness claim was transferred to admiralty by stipulation. Libelant has cross-appealed the dismissal of his negligence count, on the ground that even if a Jones Act claim will not lie, he can maintain a negligence action on the admiralty side under traditional maritime law, see *Pope & Talbot v. Hawn*, 346 U.S. 406, 413 (1953). Apparently the District Court did not rule on this contention. However, in view of our affirmance of libelant's unseaworthiness claim, we decline to rule either on the District Court's dismissal of the Jones Act claim, or on libelant's argument for a negligence claim in admiralty.

2. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§901-950 (1964).

3. 33 U.S.C. §905:

"The liability of an employer prescribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, * * * otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

District Court held otherwise, relying on *Reed v. The Yaka*, 373 U.S. 410 (1962).

Appellant seeks to distinguish that case, asserting that there the employer, holding a bareboat charter from the shipowner, was obligated under the charter agreement to make the owner whole for damages resulting from an unseaworthy condition caused by the charterer. Appellant thus likens that case to *Ryan Stevedoring Company v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). In *Ryan* the imposition on the employer of the economic burden of its employee's recovery for unseaworthiness was allowed notwithstanding the provisions of §905. This result, however, was justified upon the ground that by its warranty to the shipowner the employer took upon itself not only its own limited obligations to its employee under the Act, but the obligations of the shipowner as well.

In this case, appellant asserts, we do not have the three-party situation which existed in *Ryan* and in *The Yaka*, where the employer's unseaworthiness responsibility was based upon a duty to indemnify the owner. Here it is asserted if there is such responsibility it runs directly to the employee—a result which §905 expressly forbids.

Appellant misreads *The Yaka*. Its construction of the holding is in accord with the views of the District Court in *The Yaka* but is fairly contrary to the reasoning of the Supreme Court. The Supreme Court did not hold the shipowner liable for unseaworthiness. It expressly stated: "We do not reach that question here" (373 U.S. at 411, footnote 1). It held the charterer, as owner *pro hac vice*, to a warranty of seaworthiness running to its employee. The error on which the Court of Appeals was reversed was "in holding Pan-Atlantic [the employer and charterer] could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." (373 U.S. at 412). "The only question," the Court stated (at page 412) "is whether the Longshoremen's Act prevents recovery by petitioner

for Pan-Atlantic's breach of its warranty of seaworthiness." It rejected the contention (at page 414) "that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan-Atlantic was not only the owner, *pro hac vice*, of the ship but was also petitioner's employer."

Section 905 was, in clearest terms, held not to bar recovery by an employee for a breach of his employer's warranty of seaworthiness.

The District Court did not err in so holding.

Also assigned as error are holdings of the District Court rejecting apepllant's contentions that the vessel on which injury was sustained was at the time a "dead ship"; that appellee was not at the time of injury engaged in seamen's work; that *The Yaka* is distinguishable upon the ground that it dealt with a longshoreman, while appellee was a marine electrician. In none of these do we find merit. The first contention we view essentially as one of fact upon which the court's finding was not clearly erroneous. On the last two contentions we regard *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953) as controlling.

Judgment affirmed.

MATHES, Senior District Judge, concurring specially:

I concur in the result; but do so only because *Reed v. S.S. Yaka*, 373 U.S. 410 (1963), as I understand it, *ex necessitate* reads § 5 out of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C. § 905], as applied to the case at bar.

SUPREME COURT, U. S.

FILED

MAR 9 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER 1966 TERM

No. 1,000

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Petitioner,

v.

DELBERT A. COURSE,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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In reply to respondent's contention that the case at bar does not present for decision an important question of federal law not heretofore decided by this Court (Brief of Respondent in Opposition to Writ of Certiorari, p. 12), petitioner respectfully submits the case of *Jackson* v. *Lykes Bros. Steamship Co.*, 185 So. 2d 342, No. 575, in which this Court granted certiorari on December 6, 1966. The *Jackson* case and the case at bar involve the same question, namely, wheth-

er an employee can maintain an action *in personam* against his employer-shipowner under the authority of *Reed* v. *The SS "YAKA"*, 373 U.S. 410.

The Petition for Certiorari should be granted.

Respectfully submitted,

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